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In the Supreme Court of the United States

OCTOBER TERM, 1979

RUSSELL CHARLES HUDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

JAMES A. BRUTON
Attorney
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. A) is reported at 605 F.2d 488.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1979. The petition for a writ of certiorari was filed on January 3, 1980.[1] The juris-

[1] Petitioner did not file a petition for rehearing in the court of appeals or an application for an extension of time within which to seek certiorari. The petition is therefore out of time under Rule 22(2) of the Rules of this Court.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury as to the meaning of "false or fraudulent" information under 26 U.S.C. 7205.

2. Whether the trial court correctly instructed the jury with respect to the "willfulness" element of the crime charged under 26 U.S.C. 7205.

STATUTE INVOLVED

26 U.S.C. 7205 provides as follows:

> Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both.

STATEMENT

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on two counts of willfully filing false or frauduient Employee's Withholding Allowance Certificates (Form W-4) with his employers, in violation of 26 U.S.C. 7205. The trial court sentenced him to a one-year prison term on the first count, followed by a two-year period of probation on the second count

(Pet. App. 1a). The court of appeals affirmed (Pet. App. 6a).

The evidence at trial established that in March 1976 petitioner was employed by United States Elevator Company as an elevator mechanic (III R. 13, 22).[2] After unsuccessfully attempting to claim that he was entirely exempt from federal withholding taxes,[3] petitioner filed an Employee Withholding Allowance Certificate (Form W-4) with his employer claiming 99 allowances.[4] When petitioner submitted the form to his employer, he told the payroll clerk

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[2] "R." refers to the nine-volume record in the court of appeals.

[3] Petitioner began his employment with United States Elevator in 1974. At that time, he filed with the company a Form W-4 claiming four withholding allowances. Early in 1976, petitioner attempted to revoke his previous claim of four allowances by filing a Form W-4E, Employee's Withholding Exemption Certificate, which claimed that he was exempt from any withholding tax liability. However, his employer refused to accept the form because petitioner had altered the form by crossing out part of the required certification (26 U.S.C. 3402(n)(1)) that he had incurred no income tax liability for his preceding taxable year (III R. 24-25).

[4] Pursuant to 26 U.S.C. 3402(f)(1), employees receiving wages are permitted to claim a variety of withholding "exemptions," such as a personal exemption, dependency exemptions, old age exemptions and blindness exemptions. Moreover, under 26 U.S.C. 3402(m), employees are permitted to claim withholding "allowances" based upon excess estimated itemized deductions. The Forms W-4 filed by petitioner referred to both the statutory exemptions and allowances as "allowance." We therefore use the term "allowances" to refer to both the statutory exemptions and allowances in Section 3402.

"* * * that he did not believe in paying taxes" and that "[i]t was unconstitutional to have to pay taxes" (III R. 27). He told the clerk that he had been meeting with a group, where he learned that it was unconstitutional to pay taxes (III R. 27-28) and that "99 is a code our group is using to show that we do not believe in paying taxes" (III R. 33). When he submitted the form he did not claim to belong to any church or religious order (III R. 28). The company accepted petitioner's Form W-4 and stopped withholding federal taxes from his salary (IV R. 206).

In November 1976, petitioner left United States Elevator and accepted similar employment at Dover Elevator Company (III R. 39), with which he filed another Form W-4 claiming 99 withholding allowances. He told the payroll clerk at Dover Elevator that the number 99 was a "computer figure" to "exempt him from withholding" (III R. 44). He provided additional documents, which purported to support his claim that he was a member of a religious order and was therefore exempt from withholding tax liability (III R. 69-70). On the basis of petitioner's representations, Dover Elevator did not collect withholding taxes from his salary (III R. 72). Expert testimony established that petitioner, whose gross income was between $15,000 and $35,000 in 1976, would have needed approximately $71,650 of "determinable" itemized deductions in excess of the standard deduction properly to claim 99 withholding allowances (IV R. 142-144). An analysis of petitioner's financial records showed that petitioner's allowable deductions for 1976 did not remotely approach the amount needed properly to claim 99 allowances. Other evidence established that although petitioner had filed income tax returns and paid taxes in the past, he filed no returns and paid no taxes for 1976 and 1977 (IV R. 121-122; V R. 21-22).

Petitioner testified that in 1974 he became a minister of a church known as the Universal Sanctuary of the Association of Jesus Christ of the United States of America, the Order of Almighty God, and that he conducted religious services in his home (Pet. App. 2a). He claimed that he conveyed all of his property to the church and took a vow of poverty, while he continued to work as an elevator mechanic and continued to receive salary checks from his employer (*ibid.*). His defense was that he believed that he was entitled to claim a minister's exemption from withholding taxes (26 U.S.C. 3401(a)(9)), and that he believed that his claim of 99 withholding allowances was the proper way to obtain the exemption (Pet. App. 3a).

ARGUMENT

1. Petitioner claims (Pet. 5-6) that the district court erred in instructing the jury as to the meaning of "false or fraudulent" information under 26 U.S.C. 7205.[5] He argues that the jury should have been

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[5] The district court instructed the jury as follows (VII R. 43):

> Information is false if it was untrue when made and was then known to be untrue by the person then supplying the information or causing such information to be

instructed to "decide whether zero withholding was false or fraudulent rather than deciding whether 99 was false or fraudulent" (Pet. 4 n.2). In petitioner's view, the government was required to prove not only that the information supplied by him to his employers was false or fraudulent but also that it would have resulted in incorrect withholding by the employer.

Contrary to petitioner's claim, the statute under which he was charged—26 U.S.C. 7205—has little bearing upon the correctness of the amount of tax withheld by the employer. As the court of appeals correctly held, "[t]he crime is the willful furnishing of false or fraudulent information" by the employee (Pet. App. 5a). Accord: *United States* v. *Smith*, 487 F.2d 329, 330 (9th Cir. 1973); *United States* v. *Malinowski*, 347 F. Supp. 347, 352 (E.D. Pa. 1972), aff'd, 472 F.2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973). Indeed, the language of 26 U.S.C. 7205 shows that the government is required to prove only

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filed. Information is fraudulent if it is supplied or caused to be supplied with the intent to deceive.

The court further instructed the jury (VII R. 43-44, 45):

> the government must prove that the defendant supplied the false or fraudulent information in his Form W-4, Employee Withholding Allowance Certificate, to his employers with the specific intent to interfere with the withholding and collection of his federal taxes in the manner prescribed by law.
>
> * * * * *
>
> In considering whether the defendant furnished false or fraudulent information to his employer, you should consider the defendant's entire communication to each employer, both spoken and written, not merely the Form W-4.

that petitioner was an individual "required to supply information to his employer under [26 U.S.C.] Section 3402 who willfully supplie[d] false or fraudulent information * * *."[6] Under 26 U.S.C. 3402(f)(2)(B), an employee is permitted to claim additional withholding allowances if his withholding status changes. However, that provision specifically states that the amount of allowances claimed "shall in no event exceed the number to which he is entitled on such day." See also 26 U.S.C. 3402(f)(2)(A).

The court of appeals therefore correctly approved the district court's instruction to the jury that the government was required to prove that petitioner had supplied false or fraudulent information to his employers "with the specific intent to interfere with the withholding and collection of his federal taxes in the manner prescribed by law" (VII R. 43-44). Accord: *United States* v. *Hinderman*, 528 F.2d 100, 102 (8th Cir. 1976); *United States* v. *Buttorff*, 572 F.2d 619, 626 (8th Cir.), cert. denied, 437 U.S. 906 (1978). See also *United States* v. *Smith*, 484 F.2d

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[6] Petitioner erroneously suggests (Pet. 6) that Treasury Regulations that permit an employer to reject a clearly false withholding exemption certificate submitted by an employee (Treasury Regulations, Section 31.3402(f)(2)-1(e) (26 C.F.R.)) support his claim that the government must also prove that the information supplied by the employe was capable of deceiving. While the Regulation could not have changed the statutory elements of the crime described in 26 U.S.C. 7205, it would, at all events, have no bearing on this case, where both of petitioner's employers accepted his Forms W-4 and acted upon his representations.

8, 10 (10th Cir. 1973), cert. denied, 415 U.S. 978 (1974).

United States v. *Snider*, 502 F.2d 645, 655 (4th Cir. 1974), upon which petitioner relies (Pet. 5-6), does not support his claim. In *Snider*, the defendant filed a Form W-4, claiming three billion allowances, accompanied by a letter to the Internal Revenue Service expressing his opposition to the manner in which the government spent his income tax payments. The court held as a matter of law that "[a] claim of '3 billion' [allowances] could deceive no one" (502 F.2d at 656). As the court found, such an obviously inflated claim was "purely symbolic" (*ibid.*). Thus, unlike this case, the employer in *Snider* disregarded the claim of three billion allowances and continued to collect withholding taxes (*id.* at 648). Indeed, subsequent to *Snider* the Fourth Circuit has held that the rule of that case is inapplicable to a false claim of 20 allowances on a Form W-4. *Shea* v. *United States*, 506 F.2d 1226, 1227-1228 (4th Cir. 1974). Accord: *United States* v. *Wellendorf*, 574 F.2d 1289 (5th Cir. 1978); *United States* v. *Arlt*, 567 F.2d 1295, 1298 (5th Cir. 1978); *United States* v. *Stephen*, 569 F.2d 860, 861 (5th Cir. 1978). The court of appeals therefore correctly concluded that *Snider* did not control this case.

2. Petitioner further argues (Pet. 7-12) that the district court erred in instructing the jury concerning the meaning of "willfulness" under 26 U.S.C. 7205.[1]

[1] The court instructed the jury as to willfulness as follows (VII R. 43-44, 45; emphasis supplied):

Although petitioner contends (Pet. 10-11) that the law with respect to a minister's claim of exemption from withholding taxes under 26 U.S.C. 3401(a)(9) is unclear, the court's instructions properly advised the jury that if it believed the petitioner's claim that he had been mistaken as to the requirements of the law he could not be convicted. Even on the assumption that the requirements for claiming a minister's withholding exemption are unclear, there was no justification for petitioner's knowing and willful filing of false or fraudulent Forms W-4. See *Bryson* v.

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent as the term applies means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids *purposely intending to violate the law.*
>
> That is to say in this case that the government must prove that the defendant supplied the false or fraudulent information in his Form W-4, Employee Withholding Allowance Certificate, to his employers with the specific intent to interfere with the withholding and collection of his federal taxes in the manner prescribed by law.
>
> Such intent may be determined from all the facts and circumstances surrounding the case. *An act or a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.*
>
> * * * * *
>
> An act is willfully done if done voluntarily and intentionally and with the specific intent to do something which the actor knows the law forbids. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law. *An act intended in good faith to conform to the law is not willful.*

United States, 396 U.S. 64, 72 (1969). The court of appeals therefore correctly held (Pet. App. 5a) that the trial court's instructions fairly apprised the jury of the elements of the crime charged, including willfulness, in accordance with this Court's decision in *United States* v. *Pomponio*, 429 U.S. 10, 12-13 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

JAMES A. BRUTON
Attorney

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